Supreme Court, U.S.
FILED
DEC 30 1982
ALEXANDER L. STEVAS
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

CASE NO. 82-833

STATE OF FLORIDA,

Petitioner,

-vs-

WILLIE CLAYTON SIMPSON,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

REPLY BRIEF OF PETITIONER

JIM SMITH
Attorney General

LAWRENCE A. KADEN
Assistant Attorney General

RAYMOND L. MARKY
Assistant Attorney General
(Counsel of Record)

COUNSEL FOR PETITIONER

The Capitol, 1502
Tallahassee, Florida 32301
(904) 488-0600

QUESTIONS PRESENTED

I.

WHETHER THE FLORIDA SUPREME COURT CORRECTLY CONCLUDED THAT THE RIGHT AGAINST SELF-INCRIMINATION GUARANTEED BY THE FIFTH AND FOURTEENTH AMENDMENTS APPLIED TO A DEFENDANT WHO WAS CROSS-EXAMINED AT TRIAL ABOUT HIS SILENCE AT A PRIOR PRELIMINARY HEARING FOR ANOTHER INDIVIDUAL AT A TIME WHEN THE DEFENDANT HAD NOT BEEN ARRESTED, HAD NOT RECEIVED MIRANDA WARNINGS, AND WAS NOT EVEN A SUSPECT?

II.

WHETHER THE FLORIDA SUPREME COURT CORRECTLY REFUSED TO APPLY THE HARMLESS ERROR DOCTRINE TO DETERMINE WHETHER ALLEGEDLY IMPROPER COMMENTS AND TESTIMONY ABOUT A DEFENDANT'S EXERCISE OF HIS RIGHT TO REMAIN SILENT CONSTITUTED REVERSIBLE ERROR?

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REASONS WHY THE WRIT SHOULD BE GRANTED

Respondent has asserted that Florida is now arguing an inconsistent position from that advanced in the Florida Supreme Court. This is untrue -- the state argued in its Motion for Rehearing the identical theories raised in the Petition for Writ of

Certiorari. If any party is advancing an inconsistent position it is Respondent who argued in the Florida Supreme Court that the prosecution impermissibly commented on Respondent's failure to testify before the grand jury. For example, Respondent's argument heading was:

> THE PROSECUTOR COMMITTED HARMFUL CONSTITUTIONAL ERROR BY ELICITING FROM APPELLANT DURING CROSS-EXAMINATION AND IN COMMENTING ON DURING CLOSING ARGUMENT, OVER DEFENSE OBJECTIONS, APPELLANT'S FAILURE TO TESTIFY BEFORE THE GRAND JURY. (Emphasis added).

(Brief of Appellant in Florida Supreme Court at 13). Respondent specifically argued that: "The intent of the prosecutor was clear -- to infer Appellant's guilt because of his refusal to testify before the grand jury." (Brief of Appellant in Florida Supreme Court at 13, 14.) (Emphasis added.) Respondent continued: "likewise in the instant case the

prosecutor on cross-examination elicited from Appellant his refusal to testify before the grand jury." (Brief of Appellant in Florida Supreme Court at 14.) (Emphasis added).

Now, however, Respondent has informed this Court that "respondent did not testify at any preliminary proceeding in this case, including the grand jury." (Respondent's Brief in Opposition at 3.) Who is being inconsistent?

Moreover, Respondent has urged this Court not to consider "extrarecord materials" although Respondent referred to the fact that the prosecutor (now a circuit judge) had asked "for personal reasons" that the opinion be modified. However, Respondent has not informed the Court that the "personal reasons" were found in a motion in which he stated that the Florida Supreme Court had accused him of being

"overzealous" and that that characterization was unfair because he had not referred to the grand jury. Rather, he informed the state court that Respondent had been cross-examined about his refusal to testify at another defendant's preliminary hearing which was held only because Respondent had falsely accused that defendant in an unsuccessful attempt to obtain immunity:

> 5. As an officer of this Honorable Court, it is my good faith belief the trial transcript will reflect that I did not cross-examine the defendant, Willie Clayton Simpson, about "his failure to testify before the grand jury investigating this crime", nor make reference thereto in closing argument. See pages 601-603 and page 663 of the trial transcript. In fact, Mr. Simpson never appeared before the grand jury. I did, however, cross-examine the defendant about his refusal to testify against Jimmy Lee Harold, a person whom Mr. Simpson had falsely accused of murdering Officer John Kennedy of the Delray Beach Police Department. Based on the false accusation of Willie Clayton Simpson, a probable cause arrest was made by the Palm Beach County Sheriff's Department. When Mr.

> Harold appeared at his preliminary hearing on that arrest, Willie Clayton Simpson refused to testify against Mr. Harold unless he was given immunity rather than on Fifth Amendment grounds.
>
> 6. As a lawyer and officer of this Court, it is my good faith belief that it is fairly debatable that when Simpson refused to testify against Mr. Harold, he did so not because his testimony would incriminate himself, but rather because the State would not, in exchange therefor, grant him immunity in an unrelated first degree murder charge then pending against Simpson.

As a result of this motion, the language condemning the prosecutor's conduct was removed from the opinion by the Florida Supreme Court. Yet that Court refused to retreat from its reversal even though it had to know that the prosecutor had not referred to the grand jury and that Respondent had never been before a grand jury.

The State of Florida recognized that its allegations of fact would be difficult

to sustain without this Court's having the benefit of lengthy record excerpts. A motion to certify selected portions of the record to the Court was duly filed in the Supreme Court of Florida, but that motion was denied based upon the Court's previous instruction to the state court that if the Court needed a record, it would ask for it. Therefore, should there be any doubt about which party is accurate, the State of Florida respectfully submits that the Court should request the relevant materials filed in the Supreme Court of Florida. As it stands now, Respondent has "clouded" the status of the record and has distorted in this Court, as was done in the Florida Supreme Court, what actually occurred at trial.

Again, the State of Florida categorically asserts that Respondent was <u>never called</u> to testify at a grand jury investigating this crime. Therefore, the

prosecutor's question about Respondent's refusal to testify at someone else's preliminary hearing which occurred nine months before Respondent was arrested for this crime was proper impeachment -- and any holding to the contrary flies in the face of Jenkins v. Anderson, 447 U.S. 231 (1980), and Fletcher v. Weir, ___ U.S. ___, 71 L.Ed.2d 490 (1982), which clearly hold to the contrary.

Respondent's predictable assertion that the case does not present a substantial federal question can be refuted by a reading of the cases relied upon in the state court opinion. Also, even more persuasive is the fact that on the face of the opinion upon which review is sought, the state court explicitly refers to its position on the "Fifth Amendment right to silence...." Simpson v. State, 418 So.2d 984 (Fla. 1982).

Petitioner cannot comprehend Respondent's attempt to persuade the Court that the Florida Supreme Court based its decision on precedent interpreting "a 75 year old state statute...." (Respondent's Brief in Opposition at 5.) There is absolutely no mention or reliance upon either a statute or procedural rule in this case. See Anderson v. Harless, ___ U.S. ___, 32 Cr.L. 4063 (1982); Oregon v. Hass, 420 U.S. 714 (1975). Moreover, the Florida Supreme Court indisputably cited Miranda v. Arizonza, 384 U.S. 436 (1966), and Doyle v. Ohio, 426 U.S. 610 (1976), and United States v. Hale, 422 U.S. 171 (1975), in its opinion in this case. Respondent's contention that the state court's decision was based on state law rather than federal law is spurious and merely an attempt to cloud the record to prevent a grant of certiorari.

Similarly, Respondent has argued that state law was the predicate for the Florida Supreme Court's refusal to apply the harmless error doctrine. Respondent has apparently forgotten that he argued in the Supreme Court of Florida that the error was of "constitutional dimensions" and that he specifically referred the state court to Doyle v. Ohio, supra. See Brief of Appellant in Florida Supreme Court at 15. Also, Respondent argued that such error "can never be harmless" -- an issue which will be decided this term in United States v. Hastings, Case No. 81-1463.

Moreover, both in the State's Answer Brief and the Motion for Rehearing, the State argued that if there had been error, under federal constitutional law it had to be harmless. In fact, both Doyle, supra, and Chapman v. California, 386 U.S. 18 (1967) were relied upon in the Answer Brief

at 22. Also, in the Motion for Rehearing, the State specifically urged that since the right "springs from Miranda, there is no rational reason why federal standards should not be followed...." State's Motion for Rehearing at 9. Finally, in Appellant's Reply Brief in the state court, absolutely no mention was made of the fact that state law, rather than federal law, prevented the application of the harmless error doctrine. In fact, no mention was made at all of the State's harmless error argument.

Therefore, since only harmless error under the federal Constitution was raised, and because the Florida Supreme Court chose not to discuss the issue at all, the state court decision must rest upon interpretation of federal law. Since this precise issue is currently before the Court in United States v. Hastings, review should be granted and the case stayed pending disposition of that case.

CONCLUSION

This case should be summarily vacated in light of Jenkins v. Anderson, supra, or in the alternative, the case should be held pending disposition of United States v. Hastings, supra.

JIM SMITH
Attorney General

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(Counsel of Record)

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Tallahassee, Florida 32301
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